

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 644.

COMMERCIAL INVESTMENT TRUST CORPORATION,
COMMERCIAL INVESTMENT TRUST, INC.,
UNIVERSAL CREDIT CORPORATION, *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States
for the Northern District of Indiana.

BRIEF FOR THE APPELLANTS.

Opinion Below.

The District Court did not deliver an opinion. Its final decree, dated July 25, 1946, was accompanied by certain findings of fact and conclusions of law (R. 157 *et seq.*).

Jurisdiction.

Petition for appeal was filed on September 16, 1946 (R. 206-207), and the appeal was allowed on September 18, 1946 (R. 213-214). The jurisdiction of this Court, to review the decree of the District Court upon direct appeal, is con-

ferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. Sec. 29) and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. Sec. 345). The direct appeal provided by these statutes is the sole mode of review available to appellants. This Court noted probable jurisdiction on November 12, 1946 (R. 223).

Questions Presented.

On November 7, 1938 the United States filed a complaint in equity in the Court below, under Section 4 of the Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. Sec. 4, against Ford Motor Company (hereinafter referred to as "Ford") and against Commercial Investment Trust Corporation and certain of its subsidiaries, the appellants herein (hereinafter referred to as "Appellant Finance Companies") (R. 1 *et seq.*).

On November 15, 1938 a consent decree against Ford and the Appellant Finance Companies was entered in the Court below (R. 18 *et seq.*). Paragraph 6(i) of the consent decree restrains Ford from arranging or agreeing with Appellant Finance Companies that an agent of the Appellant Finance Companies and an agent of Ford shall together be present with any dealer for the purpose of influencing the dealer to patronize Appellant Finance Companies (R. 23). Paragraph 6(k) restrains Ford from recommending, endorsing or advertising the Appellant Finance Companies to any dealer or to the public (R. 30). Paragraph 7(d) is the counterpart of paragraph 6(i) in that it restrains the Appellant Finance Companies from arranging or agreeing with Ford that an agent of Ford and an agent of the Appellant Finance Companies shall together be present with any

dealer for the purpose of influencing the dealer to patronize the Appellant Finance Companies (R. 32). Other provisions of the consent decree restrain Ford and Appellant Finance Companies in other respects (R. 20-23; 31-32).*

Paragraph 12a of the consent decree provides that after January 1, 1940, or after certain other contingencies, upon application of any of the consenting parties, the restraints

* Ford is to permit any finance company, or any person, to pay for any automobile shipped by Ford to any dealer (R. 20-21); Ford shall not refuse to make available documents of title or liens in respect of automobiles if it makes such documents available to any finance company (R. 21); Ford shall not refuse to furnish space to any finance company for maintaining an office in Ford's place of business if similar space is furnished to any other finance company (R. 21); Ford shall not refuse to furnish information regarding dealers to any finance company so long as similar information is furnished to any other finance company (R. 21).

Ford shall not establish practices for financing automobiles whereby any particular finance company is given competitive advantage over another finance company (R. 21-22); Ford shall not deny any dealer any service or facility or discriminate among its dealers in favor of a particular finance company (R. 22); Ford shall not have any agreements with any dealers to patronize any particular finance company or require any dealer to observe any plan or rate of financing designated by Ford (R. 22-23); Ford shall not cancel or terminate any franchise agreement with any dealer or threaten to do so because of the failure of the dealer to patronize Appellant Finance Companies or any other particular finance company (R. 23). Ford is not to use any information to influence the dealer to patronize a particular finance company (R. 31).

Appellant Finance Companies shall not represent in any manner to any dealer that Ford requires them to patronize such finance company or that its failure to do so will result in the cancellation or termination of his franchise or agreement or in the loss of any advantage of service or facility furnished by Ford or that such finance company can obtain any privilege for the dealer which was not available to any other finance companies (R. 31).

Appellant Finance Companies are directed to pay, within 30 days after liquidation of all retail paper, to any dealer the amount of all reserves standing to the credit of the dealer (R. 31); Appellant Finance Companies will not enter into any arrangement with any dealer for wholesale financing for which a separate charge is not made, and which arrangement requires the dealer to deal with such finance companies in respect of retail financing (R. 31-32).

and requirements contained in certain paragraphs of the decree, including paragraphs 6(i) and 6(k), would be suspended until such time as they would be imposed in substantially identical terms upon General Motors Corporation and its subsidiaries and that the restraints and requirements contained in certain other paragraphs of the decree, including paragraph 7(d), would be suspended until such time as they would be imposed in substantially identical terms upon General Motors Acceptance Corporation and its subsidiaries either by a decree or the equivalent thereof. The equivalent of a decree, according to paragraph 12a, (2) of the consent decree, would be a determination by the Trial Court, in its instructions to the jury in criminal proceedings then pending against General Motors Corporation and General Motors Acceptance Corporation and others, that the particular acts or practices enjoined by paragraphs 6(i), 6(k) and 7(d) constituted a proper basis for the return of a general verdict of guilty (R. 35-38).

The criminal case against General Motors was tried in the Fall of 1939, and resulted in a conviction on November 17, 1939. The instructions of the Trial Court to the jury (R. 91 *et seq.*) did not include an instruction that the acts or practices enjoined by paragraphs 6(i), 6(k) and 7(d) would constitute a proper basis for the return of the general verdict of guilty.

On May 4, 1946, the Appellant Finance Companies filed a motion, pursuant to subparagraphs (2) and (3) of paragraphs 12a of the consent decree, to suspend paragraphs 6(i), 6(k) and 7(d) until the restraints and requirements contained in such paragraphs are imposed in substantially identical terms upon General Motors Corporation and its subsidiaries and General Motors Acceptance Corporation and its subsidiaries, respectively, and to modify paragraph

6(e) (R. 21-22), during the suspension of paragraphs 6(i), 6(k) and 7(d) to the extent that paragraph 6(e) would enjoin any of the acts and practices prohibited by paragraphs 6(i) and 6(k) (R. 187 *et seq.*). No relief was sought with respect to any other injunctive provisions of the consent decree.

The position taken by Appellant Finance Companies was that the Trial Court in the General Motors criminal case did not instruct the jury that the acts or practices restrained by paragraphs 6(i), 6(k) and 7(d) of the consent decree constituted a proper basis for a general verdict of guilty. On the contrary, Appellant Finance Companies called attention to the fact that the Trial Court, in its instructions in that criminal case, gave just the opposite instructions.

The Court below made findings of fact that under paragraph 12a (2) of the consent decree a general verdict of guilty was the equivalent of a decree restraining the performance by General Motors of the acts or practices enjoined by paragraphs 6(i), 6(k) and 7(d), and that the prohibitions of these paragraphs had been imposed in substantially identical form upon General Motors Acceptance Corporation by reason of the verdict of guilty (R. 159). The Court below also concluded that the Trial Court in the General Motors criminal case had given instructions that the acts and practices enjoined in paragraphs 6(i), 6(k) and 7(d), among others, constituted a proper basis for the return of the general verdict of guilty (R. 159).

The questions presented are:

1. Did the Court below erroneously refuse to suspend and modify the consent decree in accordance with the express provisions of such decree?

2. Did the Court below erroneously conclude that the general verdict of guilty in the criminal case against General Motors Corporation was the "equivalent" of a decree under paragraph 12a (2) of the consent decree restraining the performance by General Motors Corporation of the acts or practices enjoined by paragraphs 6(i), 6(k) and 7(d) of the consent decree?

3. Did the Court below erroneously conclude that the Trial Judge, in his instructions to the jury in the criminal proceedings against General Motors Corporation and General Motors Acceptance Corporation, held that the acts and practices restrained by paragraphs 6(i), 6(k) and 7(d) of the consent decree would constitute a proper basis for the return of a general verdict of guilty against General Motors Corporation?

Statute Involved.

The relevant provisions of Section 1 of the Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. Sec. 4, known as the Sherman Act, follow:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. • • •

Statement.

Factual Background.—On May 7, 1938, at South Bend, Indiana, three indictments were simultaneously filed against three separate groups of defendants. One indictment was filed against General Motors Corporation and General Motors Acceptance Corporation and others; the second indictment was filed against Chrysler Corporation and

Commercial Credit Corporation and others, and a third indictment was filed against Ford and Appellant Finance Companies and others. Each indictment alleged a separate conspiracy to violate the Sherman Act in respect of cars made only by the particular manufacturer named in that particular indictment. No defendant in any one indictment was also a defendant in either of the other two indictments.

In November, 1938, arrangements were made between the Government and the defendants in the Ford and Chrysler indictments for the dismissal of such indictments, the filing of civil complaints and the entry of consent decrees thereon. The General Motors group declined to enter into such an arrangement and the indictment against such group continued.

The equity complaint against Ford and Appellant Finance Companies was filed on November 7, 1938 in the United States District Court for the Northern District of Indiana, South Bend Division (R. 1 *et seq.*). The bill of complaint alleged that Ford, together with the Appellant Finance Companies* had conspired to exclude all other finance companies from financing the sale of Ford automobiles in violation of Section 1 of the Sherman Act. Answers were filed denying the material allegations of the complaint, denying that the defendants were engaged in any acts or practices in restraint of trade, and pleading certain affirmative defenses (R. 14-18; 182-186).

* The complaint alleges that Ford had organized Appellant Universal Credit Corporation in 1928 and sold all of the stock in Universal Credit to Appellant Commercial Investment Trust Corporation in 1933 (R. 2). The Ford answer admits that it organized Universal Credit Corporation in 1928, acquired a major portion of the capital stock of Universal Credit, and in 1933 sold its stock in Universal Credit to Commercial Investment Trust Corporation (R. 14). In other words, since 1933 Ford has had no stock interest in, nor affiliation with, Universal Credit, and never had any stock interest in, or affiliation with any of the other Appellant Finance Companies.

On November 15, 1938, the consent decree was entered in the Court below (R. 18 *et seq.*). This decree had various injunctive provisions restraining Ford and Appellant Finance Companies from entering into certain agreements or engaging in certain acts or practices, as well as provisions enabling those parties to obtain the suspension of certain of the injunctive provisions if similar restraints were not obtained against General Motors Corporation and General Motors Acceptance Corporation.

The relevant portion of paragraph 6(i) of the consent decree provides:

"(i) The Manufacturer shall not, except in each instance upon written request of the dealer or prospective dealer, arrange or agree with Respondent Finance Company or any other finance company that an agent of the Manufacturer and an agent of the finance company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer to patronize Respondent Finance Company or such other finance company;" (R. 23).

The relevant portion of paragraph 6(k) of such decree provides:

"(k) The Manufacturer shall not recommend, endorse or advertise the Respondent Finance Company or any other finance company or companies to any dealer or to the public;" (R. 30).

Paragraph 7(d), the counterpart of paragraph 6(i), provides in part:

"(d) [The Finance Company] Shall not, except upon written request of the dealer or prospective dealer, arrange or agree with the Manufacturer that an agent of the Manufacturer and an agent of the Respondent Finance Company shall together be present with any dealer or prospective dealer for the purpose of influencing the dealer or prospective

dealer to patronize Respondent Finance Company;" (R. 32).*

Since paragraph 12a sets forth the conditions and circumstances under which Appellants are entitled to have the injunctive provisions of paragraphs 6 and 7 suspended, we believe that it is important to quote paragraph 12a in full. It provides (R. 35-38):

"It is a further express condition of this decree that:

(1) If the proceeding now pending in this court against General Motors Corporation instituted by the filing of an indictment by the Grand Jury on May 27, 1938, No. 1039, or any further proceeding initiated by reindictment of General Motors Corporation for the same alleged acts, is finally terminated in any manner or with any result except by a judgment of conviction against General Motors Corporation and General Motors Acceptance Corporation therein, then and in that event every provision of this decree except those contained in this sub-paragraph (1) of this paragraph

* The pertinent part of paragraph 6 (e) of the consent decree provides (R. 22):

"(i) the Manufacturer shall not establish any practice, procedure or plan for the retail or wholesale financing of automobiles for the purpose of enabling Respondent Finance Company or any other finance company or companies to enjoy a competitive advantage in obtaining the patronage of dealers through any service, facility or privilege extended by the Manufacturer pursuant to such practice, procedure or plan if such service, facility or privilege or a service, facility or privilege corresponding thereto, is not made available upon its written request to any other finance company upon substantially similar terms and conditions; and

"(ii) so long as the Manufacturer shall continue to afford any service, facility or privilege not otherwise specifically referred to in this decree to Respondent Finance Company or any other finance company or companies, it shall not refuse to afford similar or corresponding services, facilities or privileges upon substantially similar terms and conditions and upon written request to any other finance company for the purpose of giving Respondent Finance Company or any other finance company or companies a competitive advantage in obtaining the patronage of dealers;"

12a of this decree, shall forthwith become inoperative and be suspended, until such time as restraints and requirements in terms substantially identical with those imposed herein shall be imposed upon General Motors Corporation and General Motors Acceptance Corporation and their subsidiaries either (a) by consent decree, or (b) by final decree of a court of competent jurisdiction not subject to further review, or (c) by decree of such court which although subject to further review continues effective. The court reserves jurisdiction upon application of any party to enter orders at the foot of this decree in accordance with the provisions of this paragraph.

(2) *A general verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corporation which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty. A special verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to constitute a determination of the illegality of any agreement, act or practice of General Motors Corporation which is the subject of such special verdict of guilty. A plea of guilty or nolo contendere by General Motors Corporation, followed by the entry of judgment of conviction thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice which is the subject matter of such plea. The determination, in the manner provided in this clause, of the illegality of any agreement, act or practice of General Motors Corporation shall (for the purpose of clause (3) of this paragraph) be considered as the equivalent of a decree restraining the performance by General Motors Corporation of such agreement, act or practice, unless or until such*

judgment is reversed, or unless such determination is based, in whole or in part, (a) upon the ownership by General Motors Corporation of General Motors Acceptance Corporation, or (b) upon the performance by General Motors Corporation of such agreement, act or practice in combination with some other agreement, act or practice with which the respondents are not charged in the indictment heretofore filed against them by the Grand Jury on May 27, 1938, No. 1041;

(3) *After the entry of a consent decree against General Motors Corporation, or after the entry of a litigated decree, not subject to further review, against General Motors Corporation by a court of the United States of competent jurisdiction, or after the entry of a judgment of conviction against General Motors Corporation in the proceeding hereinbefore referred to, or after January 1, 1940 (whichever date is earliest), the court upon application of any respondent from time to time will enter orders:*

(i) *suspending each of the restraints and requirements contained in sub-paragraphs (d) to (f) and (h) to (l), inclusive, of paragraph 6 of this decree to the extent that it is not then imposed, and until it shall be imposed, in substantially identical terms, upon General Motors Corporation and its subsidiaries, and suspending each of the restraints and requirements contained in sub-paragraphs (a), (c) and (d) of paragraph 7 of this decree to the extent that it is not imposed and until it shall be imposed in substantially identical terms, upon General Motors Acceptance Corporation and its subsidiaries, either (w) by consent decree or (x) by final decree of a court of competent jurisdiction not subject to further review, or (y) by decree of such court which, although subject to further review, continues effective, or (z) by the equivalent of such a decree as defined in clause (2) of this paragraph; provided, however, that if the pro-*

visions of a consent or litigated decree against General Motors Corporation and its subsidiaries corresponding to sub-paragraphs (j) and (k) of paragraph 6 of this decree are different from said sub-paragraphs of this decree, then upon application of the respondents any provision or provisions of said sub-paragraphs will be modified so as to conform to the corresponding provisions of such General Motors Corporation decree;

(ii) suspending each of the restraints and requirements contained in the remaining subparagraphs (a), (b), (c) and (g) of paragraph 6 to the extent that it is not then imposed, and until it shall be imposed, upon General Motors Corporation and its subsidiaries in any manner specified in the foregoing sub-clause (i) of clause (3), if any respondent shall show to the satisfaction of the court that General Motors Corporation or its subsidiaries is performing any agreement, act or practice prohibited to the Manufacturer by said remaining subparagraphs, and suspending each of the restraints and requirements contained in subparagraph (b) of paragraph 7 of this decree to the extent that it is not imposed, and until it shall be imposed, upon General Motors Acceptance Corporation and its subsidiaries in any said manner, if any respondent shall show to the satisfaction of the court that General Motors Acceptance Corporation is performing any agreement, act or practice prohibited to Respondent Finance Company by said subparagraph (b) of paragraph 7;

(iii) Suspending the restraints of subparagraph (d) of paragraph 7 of this decree as to Respondent Finance Company, in the event that the restraints of subparagraph (i) of paragraph 6 of this decree are suspended as to the Manufacturer.

(4) *The right of the respondents or any of them to make any application for suspension of any provisions of this decree in accordance with the provisions of this paragraph and to obtain such relief is hereby expressly granted.*" (Italics supplied.)

Thus, under paragraph 12a (3) of the consent decree the restraints and requirements contained in paragraphs 6(i) and 6(k), would be suspended until such time as they should be imposed, in substantially identical terms, by a decree upon General Motors Corporation and its subsidiaries or "by the equivalent of such a decree" (R. 36-37).

Similarly, the restraints and requirements contained in paragraph 7(d) would be suspended until such time as they should be imposed, in substantially identical terms, by a decree upon General Motors Acceptance Corporation and its subsidiaries "or by the equivalent of such a decree" (R. 36-37).

The "equivalent of such a decree" in both instances is defined as the Trial Court's instructions to the jury in the criminal proceedings then pending against General Motors Corporation and others, including General Motors Acceptance Corporation, that the acts or practices restrained by paragraphs 6(i), 6(k) and 7(d) constituted "a proper basis for the return of a general verdict of guilty" against General Motors Corporation (R. 35-36).

The Criminal Case Against General Motors Corporation.

—The criminal case against General Motors was tried in 1939 and the jury, on November 17, 1939, returned verdicts of guilty against General Motors Corporation and General Motors Acceptance Corporation. On appeal to the United States Circuit Court of Appeals for the Seventh Circuit, these convictions were affirmed, 121 F. (2d) 376.

This Court denied a petition for certiorari (314 U. S. 618), and denied a petition for rehearing (314 U. S. 710).

The instructions of the Trial Court on November 15 and 16, 1939 (R. 91 *et seq.*) and their interpretation by the Circuit Court of Appeals for the Seventh Circuit in the case of *United States v. General Motors Corporation et al.*, 121 F. (2d) 376, 385, held that the only agreements, acts or practices of General Motors Corporation and General Motors Acceptance Corporation which constituted a proper basis for a general verdict of guilty were those which coerced General Motors dealers and retail purchasers to finance their automobiles through a company with which they would not have financed them had they been free of such coercion.

Instructions to the Jury in the General Motors Case.—

The instructions of the Trial Court likewise showed with unmistakable clarity that the acts and practices enjoined by paragraphs 6(i), 6(k) and 7(d) of the consent decree, were lawful and did not constitute a proper basis for a general verdict of guilty.

The Trial Court instructed:

“ * * * it is not charged here that to recommend the use of GMAC there is anything wrong;” (R. 99)

The Trial Court also said:

“You know, you have heard of the terms:

“Exposition;

“Persuasion;

“Argument;

“Coercion.

“They are different steps. They are graduated steps that I suppose every salesman goes through, except perhaps the last.

"In Exposition one may expound the merits of that which he has to sell; he may explain its nature and by his exposition make a clear picture of what he has.

"By persuasion he may endeavor to persuade the person to whom he is talking to accept that which he has to offer.

"There is little advancement in his future progress to argue.

"Persuasion means something softer than argument, perhaps, but he may argue with him, and argue with him the respective merits of his product and other products being offered to the person to whom he makes his offer.

"All of these are proper.

"He may not go beyond that and use something that is within his power to use as a club to coerce the person to accept that which he has to offer." (R. 100)

Later, the Trial Court said:

"I think I said to you yesterday that the defendants may expound the alleged advantages of GMAC; they may explain fully the characteristics of its operations, as they claim they exist; they may point out the advantages; they may expound all of those things; they may persuade; they may use persuasion in their conversations, in their communications with their dealers; they may even argue. Those things are all proper. They have a right, as I have said, to determine to whom they shall sell their automobiles and to whom they shall not. Those things constitute no violation of the law.

"* * * and the charge in this indictment is, that this coercion, this misuse, that has proceeded, according to the indictment, beyond exposition, persuasion and argument, has resulted in a situation where the commerce in General Motors cars, the products of General Motors, from state to state, has been un-

reasonably and unduly restricted and restrained.”
(R. 112-113)

In this connection, the opinion of the Circuit Court of Appeals stated, 121 F. (2d) 376, 385:

“The Court [below] pointed out that the defendants had the right to select any dealers they saw fit, determine upon what terms to sell General Motors cars, expound the advantages of GMAC and persuade dealers to use GMAC. But the Court added that they could not utilize existing and prospective contracts with dealers as ‘clubs or instruments’ of coercion to compel acceptance of GMAC.”

Civil Suit Against General Motors Corporation.—On October 4, 1940, the United States filed its bill in equity in the District Court of the United States for the Northern District of Illinois, Eastern Division, against General Motors Corporation and General Motors Acceptance Corporation. This suit seeks the divorcement of General Motors Acceptance Corporation from General Motors Corporation. This complaint (which is a public document) does not ask for injunctive relief against the doing of the acts and practices enjoined by the consent decree in this case (R. 177). Nor has the complaint in the civil suit against General Motors ever been amended to ask such relief. To date, this civil suit against General Motors has not been brought to trial.

The Motion Below.—On May 4, 1946, the Appellant Finance Companies filed their motion below to suspend paragraphs 6(i) and 6(k) until the restraints and requirements contained in such paragraphs are imposed in substantially identical terms upon General Motors Corporation and its subsidiaries, and to suspend paragraph 7(d)

until the restraints and requirements contained in such paragraph are imposed in substantially identical terms upon General Motors Acceptance Corporation and its subsidiaries, either by consent decree, or by final decree of a court of competent jurisdiction not subject to further review, or by decree of such court which, although subject to further review, continues effective; and to modify paragraph 6(e), during the suspension of paragraphs 6(i), 6(k) and 7(d), to the extent that such paragraph 6(e) would enjoin any of the acts prohibited by paragraphs 6(i) and 6(k) (R. 187).

No relief was requested by Appellant Finance Companies (or by Ford in its motion) from any of the many other injunctive provisions of paragraphs 6 and 7 of the consent decree.

Action of the Court Below.—The motion by the Appellant Finance Companies, a motion by the Government and a motion by Ford,* were heard by the Court below on June 10, 1946. After hearing argument, the Court, on July 25, 1946, made its "Findings of Fact, Conclusions of Law, and Order," denying the Appellant Finance Companies' motion, denying the Ford motion and granting the Government's motion (R. 157-162). There was no opinion.

Paragraphs 7, 8 and 9 of the Findings of Fact of the Court below read as follows (R. 159):

"7. That the trial court in its instructions to the Jury in the criminal antitrust proceedings against General Motors Corporation, et al., held that the agreements, acts, and practices enjoined in Paragraphs 6 (i), 6 (k) and 7 (d) of the Ford decree herein, among others, constituted a proper basis for the return of a general verdict of guilty.

* Appellant Finance Companies did not join in the application by Ford seeking to terminate the injunction against affiliation.

"8. That under Paragraph 12, a (2) of the decree herein, the general verdict of guilty in the General Motors case, under the instructions to the jury by the trial court, is equivalent to a decree restraining the performance by General Motors Corporation of such agreement, acts, or practices as are enjoined herein by paragraphs 6 (i) 6 (k) and 7 (d) and other paragraphs of the decree.

"9. That the prohibitions contained in Paragraphs 6 (i) 6 (k) and 7 (d) of the decree herein have been imposed in substantially identical terms upon General Motors Corporation and General Motors Acceptance Corporation as a result of the general verdict of guilty against them under proper instructions from the trial court in accordance with the provisions of Paragraph 12a(2) of the decree herein."

We submit that the Court below erred in making each of these findings.

Summary of Argument.

1. The express conditions subsequent, incorporated into the consent decree for the benefit of the consenting parties, including Appellant Finance Companies, are as binding upon the Government as the other provisions are upon the other signatories. These conditions are integral parts of the decree and must be given full effect.

2. Pursuant to paragraphs 12a (2) and (3) of the consent decree, application may be made for the suspension of any of the restraints contained in certain enumerated paragraphs (including paragraphs 6(i), 6(k) and 7(d)) if substantially identical restraints are not imposed upon General Motors Corporation and General Motors

Acceptance Corporation by a consent or litigated decree or the equivalent thereof. Under paragraph 12a (2), the equivalent of a decree is the determination of the illegality of such act or practice by reason of instructions by the Trial Court to the jury in the General Motors criminal proceeding that such act or practice would be a proper basis for the return of a general verdict of guilty.

3. A general verdict of guilty in the General Motors case was not stated to be the equivalent of a decree against General Motors and the Court below erred in so holding. Whether there is the equivalent of a decree restraining General Motors Corporation and General Motors Acceptance Corporation from doing the acts enjoined by paragraphs 6(i), 6(k) and 7(d), must, therefore, be determined by an examination of the instructions in the General Motors criminal case. If there were no instructions that the acts and practices enjoined by paragraphs 6(i), 6(k) and 7(d) would support a verdict of guilty, then there is no "equivalent" of a decree under paragraph 12a(2), and the Court below erred in not so finding.

4. The general verdict of guilty alone does not restrain General Motors Corporation and General Motors Acceptance Corporation from doing any of the acts and practices enjoined by the decree, including those specifically sought to be suspended, and the Court below erred in finding that it does. Appellant Finance Companies' right to seek suspension of particular restraints under paragraph 12a (3), "after the entry of a judgment of conviction" in the General Motors proceeding, clearly establishes the error of the finding of the Court below. If such finding is affirmed on appeal, the judgment of conviction in the General Motors proceeding would render all provisions of the consent decree

final, and the elaborate machinery provided by paragraphs 12a(3) and 12a(2) would be rendered meaningless. Such an interpretation would defeat the intention of the parties and be repugnant to the plain language of the consent decree.

5. The parties intended to be bound only by instructions of the Trial Court and not by the evidence that might be offered by the Government or by any claim or assertion made by the Government in the General Motors criminal case. If the test of an "equivalent" of a decree was to be the evidence offered by the Government, or any claim or assertion made by it, the parties would have said so. Therefore, any evidence offered at the trial of the criminal case, or any claim or assertion advanced by the Government therein, cannot be used as the basis for determining whether there was the "equivalent" of a decree.

6. The Trial Court's instructions to the jury in the General Motors case did not include a statement that the acts or practices enjoined by paragraphs 6(i), 6(k) and 7(d) would support a general verdict of guilty. On the contrary, those instructions recognized the legal line of demarcation between permissible acts of persuasion, exposition and argument and the area of conduct outlawed under the Sherman Act, such as coercive agreements, acts and practices. Those instructions clearly indicate that, under paragraphs 12a (2) and (3) of the decree, General Motors Corporation and General Motors Acceptance Corporation have not been subjected to the "equivalent" of a decree restraining their performance of the acts prohibited by paragraphs 6(i), 6(k) and 7(d), and, therefore, the motion for suspension thereof was improperly denied.

7. The practices presently enjoined by paragraphs 6(i), 6(k) and 7(d) of the consent decree do not involve

unreasonable restraints of trade, and the requested suspension, if granted, will not defeat any other provision of the consent decree.

8. Appellant Finance Companies are, at an economic disadvantage by reason of the injunctive provisions against them and the Government's failure to obtain similar injunctions against General Motors and General Motors Acceptance Corporation. Prior to and at the time of the entry of the consent decree, the Government, on numerous occasions, stated publicly that unless the General Motors group were subject to the same injunctive provisions, Appellants would be at an economic disadvantage.

The failure of the Government to obtain injunctions similar to those in paragraphs 6(i), 6(k) and 7(d), against General Motors and General Motors Acceptance Corporation, has the effect of discriminating against Appellants.

Every consideration of fair competition and equity supports the interpretation of the consent decree for which the Appellant Finance Companies contend, namely, that unless and until the Government has obtained similar injunctive provisions either by instruction of the Trial Court in the criminal case, or by decree, against General Motors and General Motors Acceptance Corporation, those restrictive provisions, in so far as they apply to Appellant Finance Companies, must be suspended.

ARGUMENT.

I.

The conditions incorporated into the 1938 consent decree for the benefit of the Appellants are binding upon the Government and must be given full effect.

The consent decree in this case evolved out of protracted negotiations between representatives of the Department of Justice, Ford and Appellant Finance Companies. It included many restraints which went beyond the injunctive provisions that are normally the consequence of litigation.*

For that very reason, Appellant Finance Companies insisted upon incorporating therein provisions designed to afford them relief from the restraints imposed if certain conditions subsequent were not satisfied. Paragraph 12a (2) and (3) established the machinery for the suspension of certain restraints if a judgment of conviction were returned under varying circumstances in the then pending criminal case against General Motors Corporation.

These provisions were carefully drafted to express the intentions of the parties. They are integral and inseparable parts of the decree, and the Appellant Finance Companies would not have consented to the decree unless those provisions were incorporated therein.

* Assistant Attorney General Thurman Arnold at the time the consent decree was submitted to the Court below said (R. 194):

"Such a method of advertising has never been held to be violative of the antitrust laws, and the legality of its use, in the absence of positive fraud, has not been questioned.

"There are no precedents which compel the adoption of such restrictions on advertising."

A consent decree is an agreement as binding upon the Government as it is upon all other signatories. *United States v. International Harvester Company et al.*, 274 U. S. 693 (1927); *United States v. Radio Corporation of America et al.*, 46 F. Supp. 654 (D. Del. 1942), appeal dismissed, 318 U. S. 796 (1943).

In the *International Harvester* case, the Government in 1923, filed a petition to modify a consent decree entered in 1918. The Government's petition sought to divide the Harvester Company into various separate corporations whereas the 1918 decree made other provisions for the dissolution of the alleged monopoly. The petition was dismissed by the District Court and the Government appealed. This Court (per Mr. Justice Sanford), affirming the Court below, stated (p. 703):

"And a construction of this decree by which, although its requirements have been fully complied with and lawful competitive conditions established, the United States would nevertheless be entitled to further relief by the division of the International Company into separate and distinct corporations for the purpose of restoring the actual competitive conditions that had existed sixteen years before the entry of the consent decree, *would plainly be repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which the International Company has, in the exercise of good faith, been entitled to rely.*" (Italics supplied.)

In the *Radio Corporation of America* case, cited above, the Government moved to vacate a consent decree theretofore entered into because it was of the opinion that the decree no longer promoted the public interest. Circuit Judge

Maris, sitting in the District Court, denied the motion and in so holding stated (p. 656):

"It has been held that such a decree in an anti-trust case binds the Government as well as the defendants (United States v. International Harvester Co., 274 U. S. 693, 703, 47 S. Ct. 748, 71 L. Ed. 1302), even though it later appears that it was inadequate when entered, for the agreement upon which it is based is within the power of the Attorney General to make and his authority to determine what relief will satisfy the requirements of the law 'includes the power to make erroneous decisions as well as correct ones.' Swift & Co. v. United States, 276 U. S. 311, 331, 332, 48 S. Ct. 311, 317, 72 L. Ed. 587. In the present case the Attorney General determined that certain relief short of that prayed for would satisfy the public interest and he agreed to the entry of decrees terminating the suit by granting that relief. *Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the Government* the defendants are entitled to set them up as a bar to any attempt by the Government to relitigate the issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decrees. Aluminum Co. v. United States, 302 U. S. 230, 232, 58 S. Ct. 178, 82 L. Ed. 219; United States v. International Harvester Co., 274 U. S. 693, 703, 47 S. Ct. 748, 71 L. Ed. 1302. This is a very real benefit of which they would be deprived were the Government's motion to be granted." (Italics supplied.)

The conditions inserted in paragraph 12a of the consent decree constitute a real benefit to the Appellant Finance Companies, and any interpretation of the decree that fails to give proper effect to this condition would be at variance with the plain language of this carefully framed decree and

at odds with the intentions and understanding of the parties thereto. If such conditions are to be lightly brushed aside, future litigants would most assuredly hesitate, if not refuse, to agree to consent decrees which contain conditions beneficial to the defendant, to the severe prejudice of effective administration of the anti-trust laws.

The express conditions subsequent, which Appellant Finance Companies seek to invoke, must, therefore, be given full effect and interpreted in the light of their purpose and the understanding of the parties.

11.

Under paragraphs 12a (2) and (3) of the decree, Appellants are entitled to the suspension of certain restraints if substantially identical restraints are not imposed on General Motors Corporation and General Motors Acceptance Corporation by a decree or its equivalent, namely conviction on instructions that such practices would constitute a proper basis for a verdict of guilty.

(a) A general verdict of guilty against General Motors Corporation was not intended by the parties to be, and is not, the equivalent of a decree against General Motors Corporation, and the Court below erred in so holding.

Finding of Fact No. 9 of the Court below reads (R. 159):

"9. That the prohibitions contained in Paragraphs 6 (i) 6 (k) and 7 (d) of the decree herein have been imposed in substantially identical terms upon General Motors Corporation and General Motors Acceptance Corporation as a result of the general verdict of guilty against them under proper instructions from the trial court in accordance with

the provisions of Paragraph 12a(2) of the decree herein."

The Court below concluded, therefore, that suspension of the provisions of paragraphs 6(i), 6(k) and 7(d) of the consent decree could only be sought if the Government failed to obtain a general verdict of guilty against General Motors Corporation and its subsidiaries in the then pending criminal action. This conclusion, we submit, was plainly wrong.

On the date of the consent decree, General Motors Corporation and its affiliate, General Motors Acceptance Corporation were subject to none of the restraints imposed thereby upon Ford and the Appellant Finance Companies. It was recognized that there could be varying dispositions of the Government's then pending criminal action against General Motors Corporation and that, under differing results, that corporation and its subsidiaries might not be subjected to all or even any of the restraints imposed upon Ford and Appellant Finance Companies by the consent decree. Indeed, Assistant Attorney General Thurman Arnold conceded that certain of the provisions of the consent decree went beyond any limits therefore recognized as proper by the courts (R. 194). Accordingly, in order to avoid perpetuating in the consent decree restraints which might never have warrant in law and which might never be imposed upon the competitors of Ford and of the Appellant Finance Companies, the parties incorporated in the consent decree appropriate provisions to remedy any such inequities.

Paragraph 12a of the consent decree makes provision for the relief of the consenting defendants to the extent that the restraints imposed by the consent decree are not thereafter imposed upon General Motors and General Motors Accept-

ance Corporation by decree or by the instructions of the Trial Court in the General Motors criminal case.

Paragraph 12a (1) provides that if the proceeding against General Motors Corporation did not result in a conviction, "*every provision*" of the decree except one, the bar against reaffiliation by Ford with any finance company, was to become inoperative and be suspended until substantially identical restraints were imposed upon General Motors Corporation and General Motors Acceptance Corporation by a later consent or litigated decree. (R. 35) Stated otherwise, the *entire decree* would collapse if General Motors Corporation were not convicted, and its restraints could only be revived if later proceedings succeeded in imposing substantially identical restraints upon General Motors Corporation and General Motors Acceptance Corporation.

Now what significance did the parties attach to a conviction in the General Motors case, and how was it expressed? It was obviously recognized that a judgment of conviction *alone* would not subject General Motors Corporation and General Motors Acceptance Corporation to all or any of the restraints imposed upon Ford and the Appellant Finance Companies by the consent decree. Accordingly, paragraphs 12a (2) and (3) prescribe the procedure which could be invoked in such event.

Paragraph 12a (3) provides that after the entry of a consent decree or a litigated decree *or* "after the entry of a judgment of conviction against General Motors Corporation", the Court, upon application of *any* respondent, will suspend *each* of the restraints and requirements contained in subparagraphs (d) to (f) and (h) to (l) of paragraph 6 and subparagraphs (a), (c) and (d) of paragraph 7 to the extent that such restraints are not imposed, and

until they shall be imposed in substantially identical terms, upon General Motors Corporation and its subsidiaries and General Motors Acceptance Corporation and its subsidiaries, respectively, either by (1) consent decree, or (2) a final decree of a court of competent jurisdiction not subject to further review, or (3) a decree of such court which, although subject to further review, continues effective, or (4) "by the equivalent of such a decree" as defined in subparagraph (2) of paragraph 12a* (R. 36-37).

There is admittedly no consent decree or final decree of any court imposing *any* restraints upon General Motors Corporation or General Motors Acceptance Corporation.

Is there "the equivalent of such a decree"? The consent decree itself defines such an equivalent. Subparagraph (2) of paragraph 12a provides that "a general verdict of guilty returned against General Motors Corporation . . . shall be deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corpo-

* At the time of the decree it was contemplated that there would be further proceedings against General Motors Corporation, looking toward a decree embodying the restraints of the consent decree entered against Ford and Appellant Finance Companies. But the proceeding actually instituted against General Motors Corporation in 1940 is limited only to the question of affiliation, which is not here pertinent. Those proceedings are moreover pending and have never been brought to trial. Paragraph 12a (3) recognizes the possibility that there might be no such proceeding, and, therefore, grants Ford and Appellant Finance Companies the right to seek suspension of certain specified restraints "after the entry of a judgment of conviction" or "after January 1, 1940 (whichever date is earliest)."

It is clear that even if General Motors Corporation were convicted prior to January 1, 1940, Ford and Appellant Finance Companies would be entitled to a suspension of any of the specified subparagraphs of paragraphs 6 and 7 if a decree *or the equivalent thereof* were not obtained by the Government against General Motors Corporation. If there were no decree against General Motors Corporation embodying these restraints, we must look to the instructions to the jury in the General Motors case to determine whether there is an "equivalent", which is the point in issue here.

ration which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty" and that such determination of the illegality of *any* act or practice shall (for the purposes of subparagraph (3) of paragraph 12a) be considered the *equivalent* of a decree restraining the performance by General Motors Corporation of *such* act or practice (R. 35-36).

It is especially significant that subparagraph (2) of paragraph 12a refers, in the singular, to *any* act or practice, and that subparagraph (3) of paragraph 12a refers to *each* of the restraints imposed by particular provisions of the decree, in contradistinction with subparagraph (1) of paragraph 12a, which refers to *every* provision of the decree. This detailed procedure conclusively shows that the parties carefully considered the effect of a judgment of conviction in the General Motors proceeding with respect to the particular restraints imposed by the consent decree herein.

The Government's position, as stated in the Court below, rests on the erroneous assumption that its "commitment" was fully met by the conviction of General Motors Corporation (R. 175) and that the conviction itself "under a certain type of charge by the trial court to the jury was to act as the equivalent of a civil decree against General Motors enjoining exactly the same practices that are now enjoined in paragraph 6 of the Ford decree." (R. 177).

Any interpretation which would preclude the Appellant Finance Companies from seeking the relief requested on the assumption that the judgment of conviction alone is a substitute for or the equivalent of the consent decree herein would subvert the intention of the parties as clearly expressed in the consent decree itself.

Moreover, if the Appellant Finance Companies are denied the suspension sought on the theory that the general verdict of guilty returned against General Motors Corporation enjoined that company and its affiliate, General Motors Acceptance Corporation, from the practices restrained by subparagraphs 6(i), 6(k) and 7(d), then the provisions of paragraphs 12a (3) and 12a (2) are reduced to surplusage. If the parties had so intended, only paragraph 12a (1) would have been necessary, for if a conviction was obtained, then all the provisions of the consent decree would remain operative. If paragraphs 12a (3) and 12a (2) are of any significance, it is because they set up the machinery for the suspension of particular restraints "after the entry of a judgment of conviction against General Motors Corporation".

The Appellant Finance Companies readily concede that they would not be entitled to the suspension of subparagraphs (i) and (k) of paragraph 6 and subparagraph (d) of paragraph 7, if the Government had obtained a decree against General Motors Corporation and General Motors Acceptance Corporation incorporating, in substantially identical terms, the restraints embodied in those subparagraphs. Conversely, if a decree by consent or otherwise had been entered against General Motors Corporation and General Motors Acceptance Corporation, and such decree did not incorporate each of the restraints contained in subparagraphs (i) and (k) of paragraph 6 and subparagraph (d) of paragraph 7, Appellant Finance Companies would be clearly entitled to the suspension of those restraints.

(b) The parties intended to be bound by the instructions of the Trial Court in the General Motors case and not by the evidence that might be offered, or claims asserted, by the Government.

As provided in paragraph 12a (2), the scope of the "equivalent" of a decree against General Motors Corpora-

tion turns on the Trial Court's instructions to the jury in the criminal proceeding against General Motors Corporation. Only those *instructions* are the proper points of reference for the purposes of the motion below. It cannot be tenably maintained that *evidence* introduced in the General Motors criminal proceeding, or any claims made or asserted by the Government in that case, should be the test in determining whether there has been the "equivalent" of a decree against General Motors. Clearly, if a verdict of guilty is not the "equivalent" of a decree, *a fortiori* the evidence offered or the contentions advanced by the Government cannot be the "equivalent", thereof. If the parties so intended, they would have so provided.

Appellant Finance Companies agreed to be bound only by the Trial Court's instructions in the General Motors case. Notwithstanding the conviction in the General Motors case, or the evidence on which it was based, or the claims made or asserted by the Government in that case, if, in fact, the Trial Court did not instruct the jury that any of the acts and practices restrained by paragraphs 6(i), 6(k) and 7(d) would be a proper basis for a general verdict of guilty, then Appellant Finance Companies are entitled to the suspension of those restraints. This position is no mere technicality as the Government asserted in the Court below. Appellant Finance Companies' position rests upon a basic and unequivocal provision of the consent decree to which the Government as well as the Appellants agreed. Appellants would never have signed the consent decree except upon such an understanding.

We shall next demonstrate that the instructions of the Trial Court in the General Motors criminal case specifically stated that the acts and practices enjoined by paragraphs 6(i), 6(k) and 7(d) were proper and in no manner contrary to law.

III.

The Trial Court in the General Motors case did not instruct the jury that the practices enjoined by the provisions sought to be suspended would support a verdict of guilty, and the Court below erred in so finding. On the contrary, the Trial Court in such instructions held that the acts and practices in question were legal and proper.

The Court below, in Finding of Fact No. 7, stated (R. 159):

“ * * * the trial court in its instructions to the Jury in the criminal antitrust proceedings against General Motors Corporation, et al., held that the agreements, acts and practices enjoined in Paragraphs 6(i), 6(k) and 7(d) of the Ford decree herein, among others, constituted a proper basis for the return of a general verdict of guilty.”

To this, the Appellant Finance Companies assign error.

The parties to the consent decree agreed that, for the purpose of determining the equivalent of a consent decree against General Motors Corporation, reference should be made only to the instructions of the Trial Court in the General Motors case in the event of a conviction. The interpretation of these instructions, then, is basic to the Appellant Finance Companies' motion.

Analysis of the Trial Court's instructions to the jury in the General Motors proceeding reveals nothing that even faintly suggests it was illegal or improper for General Motors Corporation to recommend, endorse or advertise General Motors Acceptance Corporation, or for a representative of General Motors Corporation and a representative of General Motors Acceptance Corporation jointly to influence a dealer.

Indeed, the Trial Court specifically instructed the jury that it was perfectly proper for General Motors Corporation to recommend General Motors Acceptance Corporation. The Court said:

"* * * it is not charged here that to recommend the use of GMAC there is anything wrong" (R. 99).

The Trial Court also stated that it was perfectly lawful and proper for General Motors Corporation and General Motors Acceptance Corporation to expound to a dealer the advantages of their product and their services, to argue the merits of their cause and to persuade or argue with the dealer to do his financing through General Motors Acceptance Corporation. The Court said:

"In Exposition one may expound the merits of that which he has to sell; he may explain its nature and by his exposition make a clear picture of what he has.

"By persuasion he may endeavor to persuade the person to whom he is talking to accept that which he has to offer.

"There is little advancement for his further progress, to argue.

"Persuasion means something softer than argument, perhaps, but he may argue with him, and argue with him the respective merits of his product and other products being offered to the person to whom he makes his offer.

"All of these are proper" (R. 100).

"... The defendants may expound the alleged advantages of GMAC; they may explain fully the characteristics of its operations, as they claim they exist; they may point out the advantages; they may expound all of those things; they may persuade; they may use persuasion in their conversations, in their communications with their dealers; they may even argue. Those things are all proper. They have a

right, as I have said, to determine to whom they shall sell their automobiles and to whom they shall not. Those things constitute no violation of the law" (R. 112-113).

If these acts were proper and legal when done, by General Motors and General Motors Acceptance Corporation (as the instructions of the Trial Court stated) how, in view of paragraphs 12a (2) and (3) of the consent decree, can they remain proscribed and enjoined when done by Ford and the Appellant Finance Companies?

If the Government had obtained a decree against General Motors which did not have injunctive provisions restraining General Motors and General Motors Acceptance Corporation from doing the acts enjoined in paragraphs 6(i), 6(k) and 7(d), but instead specifically stated that such acts were not restrained, Appellant Finance Companies would undoubtedly be entitled to have paragraphs 6(i), 6(k) and 7(d) suspended. For the same reason, where, as here, the Government has not obtained any decree against General Motors and the Government claims that there is an "equivalent" of a decree by reason of the Trial Court's instructions to the jury in the General Motors criminal case, then specific instructions that the acts enjoined by paragraphs 6(i), 6(k) and 7(d) are lawful and proper, must result in a suspension of the injunctive provisions of paragraphs 6(i), 6(k) and 7(d) of the consent decree.

It does not appear whether or not the Government asked for instructions in the General Motors criminal case that the acts and practices prohibited by paragraphs 6(i), 6(k) and 7(d) constitute a proper basis for a verdict of guilty. If no request for such instructions was made, the Government's failure to make the request is tantamount to an

admission that the acts and practices restrained would not constitute a proper basis for a verdict of guilty.

If the instructions were asked, they certainly were not given by the Trial Court. The Court stated instead that such acts and practices were perfectly lawful and proper.

In view of the fact that the consent decree was entered in November 1938 and the General Motors criminal case was tried about a year later (the conviction was on November 17, 1939), the Government should have either obtained specific instructions that the particular acts and practices enjoined by paragraphs 6(i), 6(k) and 7(d) were unlawful, or obtained a decree enjoining General Motors Corporation and General Motors Acceptance Corporation from doing the same acts.

The instructions of the Trial Court properly distinguished between practices which, as a matter of law, are proper, i.e., exposition, persuasion and argument, and those which, as a matter of law, are improper, i.e., coercion. Such a line of demarcation has long been recognized in anti-trust prosecution. See *United States v. Southern Wholesale Grocers' Association et al.*, 207 Fed. 434, 443 (D. Ala.).

The Trial Court's instruction that coercion was improper (R. 100) was not the equivalent of an instruction that the acts and practices restrained by paragraphs 6(i), 6(k) and 7(d) would constitute a proper basis for a verdict of guilty. First of all, the Trial Court had just stated in its instructions that exposition, persuasion, argument and recommendation were proper (R. 100); secondly, the legality of the particular acts and practices, restrained by the consent decree, was not intended to be tested by coercive conduct of General Motors Corporation. The parties agreed to be bound by instructions that the specific acts or practices enjoined would, as a matter of law, be stated by the Trial Court to support a verdict of guilty. Finally, no relief has been requested by Appellant Finance Companies (or by

Ford) from those paragraphs of the consent decree enjoining practices that the Trial Court in its instructions indicated were coercive. For example, the Trial Court in its instructions referred to the

“ . . . ability to cancel, the ability to refuse to renew a contract . . . as clubs upon the dealers to force them to use GMAC.” (R. 99).

The Trial Court also referred to the utilization of

“ a contract which was limited to one year and might or might not be renewed and a cancellation clause in that contract upon short notice and discrimination in the shipment or non-shipment of automobiles, used . . . as a club upon their dealers.” (R. 113).

No relief has been requested by Appellant Finance Companies (or Appellant Ford) with regard to the injunctive provisions against discrimination or cancellation of contracts in order to make a dealer do business with a particular finance company (R. 20-32).

To the extent that any act or practice was coercive, it was enjoined and it remains enjoined by the consent decree without application by the Appellant Finance Companies or anyone else to lift such restraints. But that is not to say that non-coercive acts—recommendation, exposition, persuasion or argument—are thereby to be forever enjoined, notwithstanding the express agreement of the parties that, in the event that certain instructions were given by the Trial Court in the General Motors case, those restraints were to be lifted.

The Trial Court, in its instructions, unmistakably held that it was lawful and proper for General Motors Corporation to recommend, and to persuade or argue with a dealer to do his financing with General Motors Acceptance Corpo-

ration. And the opinion of the Circuit Court of Appeals further emphasized that point in its review of those instructions (121 F. (2d) 376, 385):

"The Court [below] pointed out that the defendants had the right to select any dealers they saw fit, determine upon what terms to sell General Motors cars, expound the advantages of GMAC and persuade dealers to use GMAC."

IV.

The practices enjoined by the provisions of the decree sought to be suspended do not constitute unreasonable restraints of trade.

Paragraphs 6(i) and 7(d) enjoin a representative of Ford and a representative of Appellant Finance Companies from jointly influencing a dealer to do business with the finance company. Such conduct does not involve any restraint of trade in violation of the Sherman Act. Such activity does not suppress or lessen competition. To "influence" a dealer by legitimate exposition, persuasion or argument to do his financing through any finance company or companies does not constitute an unreasonable restraint of trade. It is, moreover, the traditional type of activity that manufacturers habitually pursue in connection with the sale of products that require servicing or financing.

No automobile manufacturer (other than Ford and Chrysler Corporation) distributing products sold on the installment plan is presently subject to such a restriction upon its business activities. And no company, bank or otherwise (other than Appellant Finance Companies and Commercial Credit Corporation), engaged in financing in-

stallment sales, is subject to such prohibitions. Can there be any doubt that the hundreds of manufacturers in this country whose products are financed through thousands of banks, do, in the presence of representatives of the banks, "influence" or "persuade," by legitimate argument; their dealers to do their financing through the banks?

As hereinabove stated, the Trial Court in its instructions to the jury in the General Motors criminal case stated that such conduct would not support a general verdict of guilty under the law (R. 99, 100, 112-113).

In *United States v. Southern Wholesale Grocers' Association*, 207 Fed. 434 (D. Ala.) similar lines of persuasion by argument were held proper. The Court said (p. 443):

"The contention of the plaintiff is that the Sherman Act prohibits a combination from addressing even *legitimate argument*, which may affect interstate trade relations, to an individual engaged in trade of that character. If the principle is correct, it would work the extinction of all trade organizations except for purely social purposes. Their only other valuable function is to redress trade grievances by legal methods. If *persuasion by argument*, made in good faith and without coercion, express or implied, is not open to them for that purpose, their usefulness is at an end. It will not be denied that there are real advantages to be derived from a proper kind of co-operation, not obtainable by a single individual, unaided. *It would be an unfortunate construction of the Sherman Law that would deprive individuals of the benefit and protection to be obtained from such co-operation.* The decree permits the organization to continue to exist for other than social purposes; indeed, for all purposes other than those expressly enjoined. This impliedly recognizes that it may have other useful functions which

it can legally perform. *No authority has been cited that goes to the extent contended for by the government, and I am not prepared to create one.*" (Italics supplied.)

Paragraph 6(k) enjoins Ford from recommending, endorsing or advertising Appellant Finance Companies or any other finance company. The legality of this practice was recognized by Assistant Attorney General Thurman Arnold, at the time the instant consent decree was submitted to the Court below (R. 194):

"Such a method of advertising has never been held to be violative of the antitrust laws, and the legality of its use, in the absence of positive fraud, has not been questioned.

"There are no precedents which compel the adoption of such restrictions on advertising."*

The Trial Court in its instructions to the jury in the General Motors case, stated:

"... it is not charged here that to recommend the use of GMAC there is anything wrong" (R. 99).

If the law were otherwise, it would be necessary (assuming trade or commerce involved) to enjoin every doctor who recommends a pharmaceutical product or endorses a hospital, druggist or optician; or every real estate operator or vendor of land or chattels who recommends an insurance company to insure the property; every commercial or

* Likewise, Holmes Baldridge, Special Assistant to the Attorney General, stated at the same time (R. 194-195):

"It is the Department's idea, the one with respect to advertising, the other with respect to adoption of a Code of Fair Competition, that this public benefit goes far beyond anything that we could hope to accomplish in a litigated case, besides eliminating the discriminatory practices and coercion complained of by the independents in this suit."

investment bank that recommends to one borrowing from it, a lawyer; and every lawyer who recommends to his client a particular bank or bonding or surety company.

The instant consent decree must be considered in the light of its purpose: the Appellant Finance Companies were willing to be enjoined from engaging in admittedly lawful activity on condition that their major competitors would be similarly restrained. The Government's failure to obtain a similar decree against General Motors Corporation and General Motors Acceptance Corporation and their subsidiaries, although over seven years have elapsed since the institution of the Government's equity suit against those two corporations, points up the propriety of the motion below.

Suspension is sought only as to those provisions of the consent decree which restrain the practices held lawful by the Trial Court, or contained in paragraphs 6(i), 6(k) and 7(d) and as to 6(e) only to the extent that the prohibitions of 6(e) overlap the prohibitions of 6(i), 6(k) and 7(d). If the instant motion is granted, moreover, the prohibitions of subparagraphs 6(a), 6(b), 6(c), 6(d), 6(e), except as above indicated, 6(f), 6(g), 6(h), 6(j), 6(l), 7(a), 7(b) and 7(c) (R. 20-32) will continue in full force and effect. These provisions effectively enjoin all acts of coercion and exclusive arrangement. Neither Appellant Finance Companies nor Appellant Ford seek the suspension of any of the restraints pertaining to the practices condemned in the General Motors case. The Circuit Court of Appeals opinion in that case conclusively demonstrates that it was the *coercive* practices of General Motors Corporation that was the gravamen of the conviction. *United States v. General Motors Corp., et al.*, 121 F. (2d) 376, 398-99.

V.

Appellants are at an economic disadvantage by reason of the injunctive provisions against them and the Government's failure to obtain similar injunctions against General Motors and General Motors Acceptance Corporation.

(a) Prior to and at the time of the entry of the consent decree, the Government recognized that unless the General Motors group were subject to the same injunctive provisions, Appellants would be at an economic disadvantage.

In 1937 and 1938, the Government, in a number of public statements, stated that the consenting parties would be at a distinct competitive disadvantage if the Government failed to obtain similar injunctive provisions against General Motors Corporation and General Motors Acceptance Corporation. One of these statements was made in November 1937 in a letter from the Assistant Attorney General of the United States to the Assistant General Counsel of General Motors Corporation. Assistant Attorney General Robert H. Jackson said (R. 196):

"The decree will also contain provisions designed to protect the defendants from competitive disadvantages which they may experience in the event that the restrictions contained in the decree are not applied to their competitors."

On November 7, 1938, Assistant Attorney General Thurman Arnold issued a press release which was approved by the Attorney General, stating (R. 198):

"General Motors has not proposed an acceptable plan for a consent decree, and therefore the case against that group must be vigorously prosecuted.

In the meantime the voluntary decrees proposed by Chrysler and Ford will go into effect, if accepted by the Court. However, the failure of General Motors to participate has made it necessary to insert provisions in the decrees insuring the Ford and Chrysler groups that General Motors will not be put on a favored basis in the event that the prosecution against it is unsuccessful. To do otherwise might enable General Motors to enjoy an unwarranted competitive advantage over Ford and Chrysler resulting from the voluntary cooperation of the latter companies with the government. Obviously, in view of the predominant position in the automobile field occupied by these three companies, *the Department cannot restrain two of them only, unless it subsequently succeeds in securing relief against the practices of the third.*" (Italics supplied.)*

When the consent decree was submitted to the District Court, the following colloquy ensued between the Court and Mr. Arnold (R. 197-198):

"The Court: I wonder what possible effect that might have on the prosecution of the other defendants, to say: this shall not be effective unless you convict certain other defendants?

"Mr. Arnold: We had to do that in order to prevent the General Motors securing a competitive advantage over the other companies. They are

* Assistant Attorney General Thurman Arnold, in a letter dated November 5, 1938, to Phillip W. Haberman, Counsel for Appellant Finance Companies, stated in part as follows (R. 197):

"I have told you throughout our conferences that the position of the Department of Justice is that no decree under the Sherman Antitrust Act should be such as to place the defendants at a competitive disadvantage in the industry, and that the Government's policy is to enforce the antitrust laws so as to restore and maintain free competition in the industry in which such decrees are entered."

highly competitive; they have cars in the same price class, and, if General Motors can continue with the practices that the Government is opposed to, when the Ford and Chrysler must desist, it places them at a distinct competitive advantage over their competitors."

Paragraph 12a was thus avowedly designed to protect the appellants against, and relieve them from, any anticipated competitive disadvantage, and its proper interpretation lies at the root of this appeal.

By the terms of paragraph 12a (4) of the consent decree "the right of the respondents . . . to make any application for suspension of *any* provision of this decree in accordance with the provisions of this paragraph and to obtain such relief is hereby expressly granted" (R. 37-38). (Italics supplied.)

If the Appellant Finance Companies were seeking the suspension of the provisions specifically enumerated in subparagraph (ii) of paragraph 12a (3), their right to such relief would be conditioned upon proof that General Motors Corporation or its subsidiaries were *in fact* engaged in such practices. Under paragraph 12a (3) (i), however, there is no such evidentiary requirement. The familiar principle of *inclusio unius, exclusio alterius* compels the interpretation that Appellant Finance Companies need not have grounded their request for relief upon proof that General Motors Corporation or General Motors Acceptance Corporation are engaging in any of the practices enjoined by paragraphs 6(i), 6(k) and 7(d).

It is equally clear that the Appellant Finance Companies need not have made any showing that they are at an economic disadvantage by reason of the continuance of the

restraints embodied in paragraphs 6(i), 6(k) and 7(d). But, even though no such showing is necessary under the terms of the consent decree, such a showing was in fact made in the Court below.

(b) To the extent that Ford is at an economic disadvantage as compared to General Motors Corporation, Appellant Finance Companies are at an economic disadvantage.

Concededly, the Government has not obtained a decree, by consent or by litigation, against General Motors or General Motors Acceptance Corporation. Nor can there be any question that Ford is at an economic disadvantage in the sale of automobiles because of the injunctive provisions against Ford to which General Motors is not subjected. As a matter of fact, the record in this case shows that for the years 1940 and 1941, the volume of business in automobiles of General Motors substantially increased, while the business of Chrysler and Ford materially decreased (R. 124-a).*

General Motors Acceptance Corporation does practically all the financing of General Motors cars. Since the volume of sales of General Motors cars increased and the volume of sales of Ford and Chrysler cars decreased, then the available market of cars which might be financed by Appellant

* This schedule stands uncontradicted in the record. It shows that of all passenger car registrations for the year 1938 General Motors had 44.8%, whereas Chrysler had 25% and Ford 20.5%. Although the passenger car registrations for the year 1939 did not vary greatly from 1938 (General Motors 44.7%, Chrysler 24.2%, Ford 21.4%), there was a marked change for the years 1940 and 1941, by which time the economic effect of the injunctions against Ford and Chrysler became apparent. Thus for the year 1940, the percentages of passenger car registrations were as follows: General Motors 47.6%, Chrysler 23.7%, Ford 18.9%; and for the year 1941 the percentages were as follows: General Motors 47.3%, Chrysler 24.2%, Ford 18.8%.

Finance Companies and other finance companies was decreased to their obvious economic disadvantage.*

The facts contained in the verified moving papers (R. 195-196), which were not contradicted below, amply establish the competitive disadvantage to which the Appellant Finance Companies have been subjected by reason of these continuing restraints.

The business of the Appellant Finance Companies in the financing of Ford automobiles diminished substantially from the date of the entry of the consent decree up to the early part of 1942, when the manufacture of automobiles ceased by reason of the fact that the United States entered the war. Furthermore, thousands of commercial banks located throughout the United States, which previously were not in the automobile financing field, entered the field between the date of the entry of the consent decree and the stoppage of the manufacture of automobiles (R. 195).

Recently, twelve large banks located in twelve key cities, with total resources of more than four billion dollars, announced a National Sales Plan for the financing of retail installment purchases of automobiles and household appliances. These banks are asking thousands of other banks throughout the country to join in the plan. The Morris Plan of America has also announced that it is entering the field. On April 1, 1946, the Irving Trust Company of New

* While Ford is enjoined by the decree from recommending or advertising any finance company and from sending representatives with representatives of a finance company to influence a dealer, only the Appellant Finance Companies, and not other finance companies, are enjoined by paragraph 7(d) from acting jointly with Ford. Thus, only the Appellant Finance Companies (and Commercial Credit Corporation under a similar injunction in the *Chrysler* case) are subject to contempt proceedings if they act contrary to the injunctive provisions of paragraph 7(d). There is, therefore, a legal disadvantage to Appellant Finance Companies as well as an economic disadvantage.

York, with total resources of more than one billion dollars, announced that it was entering the same field (R. 195-196).

Not only is there an economic disadvantage to Appellant Finance Companies and other finance companies by reason of the economic disadvantage to Ford, but there is also a competitive disadvantage to Appellant Finance Companies inherent in their inability to develop, in cooperation with Ford, a financing plan that might be beneficial to dealers and to purchasers of automobiles. There is no prohibition against General Motors Corporation (the largest single manufacturer of automobiles in this country) working out a plan of financing, with its wholly owned subsidiary, General Motors Acceptance Corporation. Ford should not be prevented from working out, with any finance company or companies, financing plans which might be of great advantage to dealers and to purchasers of automobiles. Such a plan would be in aid of competition and possibly increase the business of competitors of General Motors Corporation.

(c) The failure of the Government to obtain injunctions, similar to those in paragraphs 6(i), 6(k) and 7(d), against General Motors and General Motors Acceptance Corporation, has the effect of discriminating against Appellants.

After the Government on November 17, 1939 obtained the conviction in the criminal case against General Motors Corporation and General Motors Acceptance Corporation, the Government on October 4, 1940 filed a civil suit against General Motors and its financing affiliate to divorce the finance company from the manufacturing company. The case has not come up for trial.

General Motors Acceptance Corporation is not only a wholly owned subsidiary of General Motors, but there is a complete identity of names. Therefore, there cannot be

any question but that General Motors Corporation in effect recommends to its dealers that the financing of General Motors cars be done through General Motors Acceptance Corporation. Similarly, there cannot be the slightest doubt that representatives of General Motors Corporation and General Acceptance Corporation jointly call upon dealers and influence them to finance through General Motors Acceptance Corporation. This is inherent in the situation due to the identity of interests and identity of names, and the dealers in General Motors automobiles, as well as the public, are fully aware of this identity.

Yet the Government, in its civil suit against General Motors Corporation and General Motors Acceptance Corporation, is seeking only divorcement and not injunctions against the acts and practices enjoined in paragraphs 6(i), 6(k) and 7(d) of the consent decree here involved. There is no reason why the Government could not have asked for similar injunctive relief in the suit against General Motors Corporation and General Motors Acceptance Corporation. In fact, the Government is not even asking for injunctions against General Motors Corporation as to actual practices enjoined by the consent decree which appellants are not seeking to have suspended.

The Government's failure in the General Motors' civil suit to ask for such injunctive relief discriminates against appellants and favors General Motors Corporation. The divorcement of its finance company from General Motors Corporation, without more, would not operate to restrain General Motors Corporation and General Motors Acceptance Corporation from the acts and practices which appellants are here restrained from doing.

Even if the Government could, in the General Motors civil case, obtain relief similar to the injunctions in this

case, the fact of the matters is that, notwithstanding the expiration of more than six years, the General Motors case has not been tried.

The net result is that General Motors Corporation still has a wholly owned finance company bearing its own name and both companies, as a practical matter, are free to do any of the acts and engage in any of the practices which the Government claims appellants should continue to be enjoined from doing.

(d) The holding in the case of *Chrysler Corporation v. United States* (316 U. S. 556), is not applicable here.

The Government will probably rely on the case of *Chrysler Corporation, et al. v. United States*, 316 U. S. 556, decided by a divided court in 1942. In that case, the consent decree, entered into by Chrysler Corporation simultaneously with the consent decree here involved, was before this Court on an entirely different question than is raised by the appeal of Appellant Finance Companies. In the *Chrysler* case, the Government, on its motion, sought to extend beyond the time fixed in the consent decree, namely, January 1, 1941, the prohibition against Chrysler Corporation's acquiring an interest in a finance company. The Government obtained an order in the District Court extending the injunction against affiliation to January 1, 1942, and then, by second order, until January 1, 1943. The position of the Government was that the extension for two years of the injunction against Chrysler Corporation's obtaining an affiliate was necessary until there was a decision in the Government's civil suit against General Motors.

A majority of four Justices of this Court upheld the extension of the period against an affiliation.

In reaching this conclusion, Mr. Justice Byrnes said in part (p. 564):

"Moreover, we cannot be blind to the fact that the complete cessation of the manufacture of new automobiles and light trucks has drastically minimized the significance of the competitive factor. Consequently, there is no warrant for disturbing the finding of the court below 'that further extension of the bar against affiliation will not impose a serious burden upon defendants.'"

In the present case, Appellant Finance Companies are invoking the terms of the decree itself. They ask the Court to look to the instructions to the jury in the General Motors case, which show that the Government did not obtain the "equivalent" of a decree against General Motors Corporation or General Motors Acceptance Corporation.

Furthermore, as this record shows (without any contradictory proof), since the termination of hostilities in August 1945, automobiles and trucks have been manufactured by Ford. Also, the financing of automobiles has been revived under changed economic and competitive conditions (R. 195-196). None of these factors existed in the *Chrysler* case.

* Earlier in the opinion Mr. Justice Byrnes said (p. 563):

"The District Court found 'that the Government has proceeded diligently and expeditiously in its suit to divorce General Motors Acceptance Corporation from General Motors Corporation.' There is room for argument that this statement is markedly generous to the Government, inasmuch as the civil suit against General Motors was not instituted until almost two years after the entry of the consent decree and only three months prior to the limiting date in paragraph 12."

The decision of this Court in the *Chrysler* case was on June 1, 1942, and up to the present time there has been no trial of the issues in the General Motors case.

Just as Ford is faced with the economic fact that its largest competitor, General Motors Corporation, has its own wholly owned financing subsidiary, and therefore has an economic advantage, so Appellant Finance Companies are faced with changes in economic and competitive conditions (R. 195-196).

In the *Chrysler* case the prohibition against affiliation would have lapsed for all time without any procedure, under the consent decree, for reinstatement. Here, Appellants are merely asking for the suspension of the restraints because of the Government's failure to date to obtain a decree, or the equivalent of a decree, against General Motors and General Motors Acceptance Corporation.

Therefore, the Appellant Finance Companies should be free from injunctive provisions that place them at an unfair competitive disadvantage, unless and until, as was the stipulation between the parties, similar injunctive provisions are obtained by the Government against General Motors Corporation and General Motors Acceptance Corporation.

Conclusion.

This appeal raises the question whether this Court will require the Government to observe a solemn contractual obligation which is an integral part of the antitrust consent decree. Since the Government has not obtained substantially identical injunctions against General Motors and General Motors Acceptance Corporation, as was contemplated by the consent decree, and since the Government did not obtain the "equivalent" of such injunctions (i.e., instructions in the General Motors criminal case that the acts and practices enjoined by paragraphs 6(i), 6(k) and 7(d) would constitute the basis for a general verdict of guilty), this Court should now direct that the motion of the Appel-

lant Finance Companies be granted; otherwise, Appellants are at an economic disadvantage, as the Government in 1938 recognized they would be, because the Government failed to fulfill its commitment as provided in the consent decree.

Therefore, we submit that the order of the Court below should be reversed and the case remanded with appropriate directions to grant Appellant Finance Companies' motion to suspend the provisions of paragraphs 6(i), 6(k) and 7(d), and such parts of paragraph 6(e) as would be necessary, until substantially identical restraints are imposed by decree upon General Motors Corporation and General Motors Acceptance Corporation.

Respectfully submitted,

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